

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND YEHUDIS LUBIN	:	DETERMINATION
	:	DTA NO. 818826
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax	:	
pursuant to the Administrative Code of the City of New	:	
York for the Year 1997.	:	

Petitioners, Michael and Yehudis Lubin, 101 Route 306, Monsey, New York 10952, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 1997.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on December 4, 2003 at 1:15 P.M. Petitioner Michael Lubin appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Mac Wyszomirski).

Since neither party herein elected to file a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether interest charges imposed by the Division of Taxation on the additional tax it assessed against petitioners for the year at issue should be waived or abated.

FINDINGS OF FACT

1. The facts in this matter are not in dispute. Petitioners herein, Michael and Yehudis Lubin, are husband and wife who filed a timely New York State and City resident personal income tax return for the year 1997. On their return, petitioners claimed New York itemized deductions of \$19,510.00, which amount was computed as follows:

ITEM	AMOUNT
Taxes	\$13,471.00
Contributions	6,586.00
Total	19,730.00
Less state & local taxes	220.00
NY itemized deduction	\$19,510.00

2. Petitioners computed the \$220.00 subtraction modification for state and local taxes as shown in the above table using “Worksheet 2 - Subtraction Adjustment Limitation” found on page 32 of the instruction booklet for the 1997 tax year. In completing this worksheet, petitioners admittedly and unintentionally made an error by placing a figure on line eight which should have been entered on line seven. The following table sets forth in relevant part the manner in which petitioners completed “Worksheet 2 - Subtraction Adjustment Limitation” and the proper computation:

ITEM	PETITIONER’S	PROPER
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Line 3	.0163	.0163
Line 6	\$13,471.00	\$13,471.00
Line 7 - multiply line 6 by line 3	left blank	\$219.58
Line 8 - subtract line 7 from line 6	\$219.58	\$13,251.42
Line 11 - enter on Form IT-201-ATT, line 9	\$219.58	\$13,251.42

3. On July 3, 2000, some 27 months after petitioners filed their 1997 return, the Division of Taxation (“Division”) issued a Statement of Proposed Audit Changes (“Statement”) to petitioners correcting the error petitioners made in the calculation of the subtraction modification for state and local income taxes on “Worksheet 2 - Subtraction Adjustment Limitation.” The Statement informed petitioners that the Division had received information from the Internal Revenue Service which allowed it to discover the error petitioners had made on “Worksheet 2 - Subtraction Adjustment Limitation.”¹ The Statement further advised petitioners that:

We try to notify taxpayers of potential errors on their return as soon as possible. We could not issue this statement before now. The time needed to get the federal information and review your return caused a delay in contacting you. . . .

Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the New York State Tax Law.

4. Within two weeks of the issuance of the Statement, petitioners paid in full the additional New York State and City personal income taxes due of \$735.85; however, they disagreed with the Division’s imposition of interest charges. On August 28, 2000, the Division issued a Notice of Deficiency to petitioners asserting that for the 1997 tax year they owed \$735.85 of additional New York State and City income taxes, plus interest of \$127.39. The

¹ This worksheet was not, nor is it required to be, attached to petitioners’ 1997 tax return.

Notice of Deficiency allowed petitioners credit for their payment of \$735.85, leaving a balance due of \$127.39

5. Petitioners' prepayments of tax as shown on their 1997 New York State and City tax return, exclusive of the child and dependent care credit, included \$1,375.00 for New York State tax withheld, \$951.00 for New York City tax withheld and \$11,145.00 for estimated tax payments. These three amounts total \$13,471.00, the exact same amount claimed by petitioners on their return as an itemized deduction for taxes.

SUMMARY OF PETITIONERS' POSITION

6. Petitioners maintain that the additional tax due asserted herein is the result of a mathematical error, that the error occurred because of "the extreme nearness of line 7 to lines 6 and 8 on 'Worksheet 2 - Subtraction Adjustment Limitation' contained in the instructions to Form IT-201-ATT" and that their 1997 return supplied the Division with all the information necessary to compute their tax obligation for 1997. It is petitioners' position that the 27 months it took the Division to correct the mathematical error constitutes an unreasonable dilatory review and that the Division has the authority and obligation to abate the interest which has been assessed in a grossly unfair manner as the result of the Division's delay. As authority for their position, petitioners cite to Tax Law § 3008(a) arguing that said section "states that interest may be abated where it is related to unreasonable errors and delays attributable to the Department being dilatory in performing a ministerial or managerial act." Petitioners also point to Tax Law § 697 which grants the Division authority to abate small amounts of interest.

CONCLUSIONS OF LAW

A. Tax Law § 684, entitled “Interest on underpayment,” provides that “[I]f any amount of income tax is not paid on or before the last date prescribed in this article for payment [in this case April 15, 1998], interest on such amount . . . shall be paid for the period from such last date to the date paid” Petitioners’ request for the abatement of interest charges cannot, under the facts presented herein, be granted. The Division properly issued the Notice of Deficiency within the time period allowed by statute (Tax Law § 683), and there is no evidence in the record before me which would support that the Division intentionally or unreasonably delayed the issuance of the notice.

Furthermore, petitioners’ argument ignores the basic principle that it is their responsibility to file a correct and accurate tax return and to remit the proper tax due in a timely manner and this they did not do. By requesting that the interest charges be abated, petitioners, in essence, seek an interest-free loan from the State of New York. As noted by the Tribunal in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

B. Petitioners’ argument that the deficiency at issue is the result of a mathematical error is also rejected. If “Worksheet 2 - Subtraction Adjustment Limitation” was required to be attached to the 1997 return, then petitioners would present a more compelling argument that this was a mathematical error. However, this is not the case. Also, I do not agree with petitioners’ assertion that line 7 on “Worksheet 2 - Subtraction Adjustment Limitation” is placed too close to

lines 6 and 8 and is therefore misleading. Petitioners simply made an error on this worksheet which in my view was not the result of the design of the form.

C. Petitioners seek abatement of interest charges citing Tax Law § 3008(a)(1)² as authority for such abatement. For the year at issue, Tax Law former § 3008(a) provided for the abatement of interest on “any deficiency . . . determined to be due attributable in whole or in part to any error or delay by an officer or employee of the department (acting in his or her official capacity) in performing a ministerial act”

D. The crux of petitioners’ argument concerning the waiver of interest stems from the length of time, 27 months, that it took the Division to discover the error and issue the Notice of Deficiency. Although there are no regulations at the State level, it is appropriate to review Federal regulations and precedent since Tax Law former § 3008 is patterned after Internal Revenue Code former § 6404(e)(1). Treasury Regulation § 301.6404-2(b)(2) defines “ministerial act” as:

a procedural or mechanical act that does not involve the exercise of judgement or discretion, and that occurs during the processing of a taxpayer’s case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

Any delays at issue in this matter are not attributable to error or delay by the Division in performing a ministerial act and therefore petitioners are not entitled to have interest waived pursuant to Tax Law former § 3008(a) (*see, Strang v. Commn.*, 81 TCM 1566).

² In their petition, petitioners have made reference to Tax Law § 3008 as amended by Laws of 1997 (ch 577, § 26) which inserted the word “unreasonable” preceding “error” and reference to the performance of “managerial acts.” Since the amendment was applicable to taxable periods beginning after the September 10, 1997 effective date (L 1997, ch 577, § 56[f]), I have cited the statute as applicable for the year in question.

E. The petition of Michael and Yehudis Lubin is denied and Notice of Deficiency dated August 28, 2000 is sustained.

DATED: Troy, New York

February 26, 2004

/s/ James Hoefer
PRESIDING OFFICER